

M. Curcio



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: United Digital Networks, Inc.
File: B-222422.3
Date: April 6, 1987

DIGEST

Protester may recover the costs it incurred in filing and pursuing its protest as well as its bid preparation costs where the agency unreasonably excluded the protester from the competition, the firm did not receive the award our Office recommended, and no other remedy is available.

DECISION

United Digital Networks, Inc. (UDN), has submitted a claim for bid preparation costs and the costs of filing and pursuing its protest, including attorney's fees, as a consequence of a protest that we sustained in its favor in our decision in United Digital Networks, Inc., B-222422, July 17, 1986, 86-2 C.P.D. ¶ 79. The protest concerned invitation for bids (IFB) No. 500-72-85, issued by the Veterans Administration for a telephone and public address system. We find UDN entitled to the claimed costs.

In our decision, we held that the VA improperly permitted GTE, Inc., to correct mistakes in its bid and, consequently, improperly awarded a contract to that firm. We sustained the protest and recommended that the VA terminate the contract with GTE and award a contract to UDN.

The VA terminated the contract with GTE for the convenience of the government on December 8, 1986. By letter dated December 29, the VA notified UDN that due to a delay in site preparation and changes in state-of-the-art technology the agency was canceling the IFB and would not make an award under the protested solicitation. UDN's claim is in response to this information.

According to our Bid Protest Regulations, 4 C.F.R. § 21.6(d), (e) (1986), implementing the Competition in

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Contracting Act of 1984, 31 U.S.C. § 3554(c) (Supp. III 1985), a protester that had a substantial chance for award may recover bid preparation costs where the firm was unreasonably excluded from the competition and no other remedy enumerated in our Regulations is appropriate. See The Department of the Navy, et al.--Request for Reconsideration, B-220327.2, et al., Apr. 23, 1986, 86-1 C.P.D. ¶ 395.

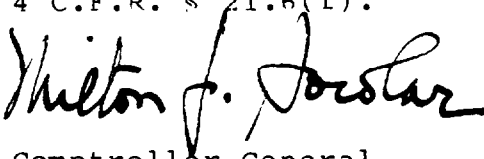
The VA argues that we should deny UDN's claim. The agency, citing our decision in Asbestos Abatement of America, Inc.--Request for Reconsideration, B-221891.2, et al., Aug. 5, 1986, 86-2 C.P.D. ¶ 146, asserts that for our Office to find that the VA unreasonably excluded UDN from the procurement, the protester must demonstrate that the agency was guilty of fraud or bad faith, a burden that, according to the VA, UDN has not met.

The VA misreads our standard for recovery of costs. The decision the VA cites involves a reconsideration of Asbestos Abatement of America, Inc., B-221891, et al., May 7, 1986, 86-1 C.P.D. ¶ 441, where the protester challenged the Department of Health and Human Services' (HHS) cancellation of a small business set-aside. We found the cancellation, based on the fact that the responsive bid submitted under the set-aside was unreasonable in price, was legally unobjectionable. In considering the protester's claim for bid preparation and protest costs, we noted there was no evidence HHS acted in bad faith in issuing the set-aside, that is, that HHS induced the protester into submitting a bid when there was no chance the firm would receive an award, a point that we reiterated in the reconsideration decision. However, the "key fact," as we put it, in denying the claim initially was that the protester was not unreasonably excluded from the procurement because there was a compelling reason to cancel the solicitation.

A protester asserting that a procuring agency improperly accepted a bid thus does not have to show that the agency acted in bad faith to demonstrate that the firm was unreasonably excluded from the competition. Rather, it is sufficient that the agency's improper action tainted the procurement process and denied the protester the opportunity to receive a contract award. See Computer Data Systems, Inc., B-218266, May 31, 1985, 85-1 C.P.D. ¶ 624. By improperly correcting GTE's bid, the VA prevented UDN from receiving the award and, since the VA has decided not to procure the telephone system at this time, no other remedy enumerated in our Regulations is appropriate. See 4 C.F.R. § 21.6(a)(1)-(5). Consequently, UDN is entitled to reimbursement of its bid preparation costs.

We also find that UDN is entitled to recover the reasonable costs of filing and pursuing its protest, including attorney's fees. These costs are recoverable where the agency unreasonably excluded the protester from the procurement, except where our Office recommends that the contract be awarded to the protester and the firm receives the award. 4 C.F.R. § 21.6(d), (e). The VA suggests in this regard that since UDN will be given the opportunity to compete for the requirement when the agency resolicits for the telephone system the firm's claim for protest costs should be denied. While we have held that where a protester is given the opportunity to compete for the award, recovery of protest costs is inappropriate, Hobart Brothers Co., B-222579, July 28, 1986, 86-2 C.P.D. ¶ 120, all UDN would be getting here is the potential opportunity to compete on some future solicitation. UDN is entitled to recover its protest costs in such circumstances. See EHE National Health Services, Inc., 65 Comp. Gen. 1 (1985), 85-2 C.P.D. ¶ 362; Consolidated Bell, Inc., B-220425.2, Aug. 18, 1986, 86-2 C.P.D. ¶ 192.

UDN should submit its claim for costs directly to the VA.
4 C.F.R. § 21.6(f).

for 
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